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THE KANSAS INDUSTRIAL RELATIONS COURT DECISION

The Kansas Court of Industrial Relations Act, declaring the business of manufacturing and preparing food for human consumption affected with a public interest, and reasonable continuity and efficiency of such industry to be necessary for the public peace, health and general welfare, and giving the industrial court power, in case of controversy between employers and workers endangering such continuity or efficiency, to fix the terms and conditions of employment, and requiring the employer to pay the wages fixed, and forbidding employees to strike against them, so far as it permits such fixing of wages, deprives the employer of its property and liberty of contract without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution, and accordingly was held to be invalid by the United States Supreme Court, in Wolff Packing Co. v. Court of Industrial Relations (43 Sup. Ct. 630).

The Court held that the right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs, is part of the liberty of the individual protected by the due process clause of the Fourteenth Amendment, and that, while there is no such thing as absolute freedom of contract, freedom is the general rule, and restraint is the exception, and must not be arbitrary or unreasonable, and can be justified only by exceptional circumstances.

The power of the State to enact laws of this kind respecting business concerns of the kind in question, must rest upon the fact that the business is affected with public interest. The public then has the right in the exercise of its police power for its own welfare to enact regulations regarding such business that it lacks in respect of purely private enterprise. However, the mere declaration by a Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois (94 U. S. 113) and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. * * *

"It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction,"

The facts of this were these: In January, 1921, the president and secretary of the Meat Cutters' Union filed a complaint with the industrial court against the Packing Company respecting the wages its employees were receiving. The company appeared and answered and a hearing was had. The court made findings, including one of an emergency, and an order as to wages, increasing them over the figures to which the company had recently reduced them. The company refused to comply with the order and the industrial court then instituted mandamus proceedings in the Supreme Court to compel compliance. That court appointed a commissioner to consider the record, to take additional evidence, and report his conclusions. He found that the company had lost $100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court. The Supreme Court overruled his report and held that the evidence showed a sufficient emergency.

On the question of power to enact such regulations, the United States Supreme Court in part said:

"Justification for such regulation is said to be found in Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. It was there held that in a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis, and grave loss and suffering overhanging the country, Congress had power to prescribe wages not confiscatory, but obligatory on both for a reasonable time to enable them to agree. The court said that the business of common carriers by rail was in one aspect a public business because of the interest of society in its continued operation and rightful conduct and that this gave rise to a public right of regulation to the full extent necessary to secure and protect it; that viewed as an act fixing wages it was an essential regulation for protection of public right; that it did not invade the private right of the carriers because their property and business were subject to the power of government to insure fit relief by appropriate means and it did not invade private rights of employees since their right to demand wages and to leave the employment individually or in concert was subject to limitation by Congress because in a public business which Congress might regulate under the commerce power.

"It is urged that under this act the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency as in Wilson v. New. If that is a real factor here, as in Wilson v. New, and in Block v. Hirsh, 256. U. S. 135, 157, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165 (see Pennsylvania Coal Co. v. Mahon, 260 U. S. —, 43 Sup. Ct. 158, 67 L. Ed. —, decided December 11, 1922) it is enough to say that the great temporary public exigencies, recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted. Here it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the state and country, and thence to all the national sources of food supply so as to produce a shortage. Whether such danger exists has not been determined by the Legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor."

NOTES OF IMPORTANT DECISIONS.

STRIKING EMBANKMENT HELD "COLLISION" WITHIN AUTOMOBILE POLICY.—Where an automobile was accidentally driven into an embankment, the accident with resulting damages were held, in Interstate Casualty Co. v. Stewart, 94 So. 345, by the Supreme Court of Alabama, to be covered by a policy insuring against damages by reason of collision with other vehicles or stationary objects. We quote at length from the opinion of the Court:

"When an automobile, covered by a policy of insurance indemnifying against damage caused solely by being in 'collision with any other automobile, vehicle or other object, either moving or stationary,' is running at an ordinary or necessary rate of speed, and for any cause leaves the road, striking an embankment of earth outside of the roadway with such force as to drive the wheels against the same, crushing one of the front wheels and causing the automobile to turn over with resulting damage, it is within the instant contract terms of indemnity. Harris v. Amer. Cas. Co., 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846; Universal Service Co. v. Amer. Ins. Co., 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183, 187, note.

"We have examined the authorities cited, and it will not be necessary to discuss each in detail to ascertain the meaning of the terms of indemnity under the contract involved. In Bell v. Amer. Ins. Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179, at the time of the accident the plaintiff was driving his automobile along a city street, turned into an avenue with the intention of backing to turn his car around, and in so doing crossed the sidewalk, practically stopped the machine preparatory to backing out, when one side gradually settled into the earth and the car turned over. Held, that this was not a collision within the terms of the policy. In Moblad v. Western Indemnity Co.(Cal. App.) 200 Pac. 750, the automobile of assured was being driven along the road, and, in order to avoid striking another vehicle, the driver swerved to the outer edge of the thoroughfare which gave way, causing the automobile to run down an embankment and turn over. Held, that the consequent damage was but the operation of physical laws set in motion when the car turned over on the edge of the roadway and was not a collision such as was covered by the policy of assured. In Stuht v. U. S. Fid. & Guar. Co., 89 Wash. 93, 154 Pac. 137, the automobile of the assured was upset at the edge of a bank, when the driver was attempting to make a short or quick turn. Held, that the upsetting of the car was not the direct result of a collision within the terms of the policy of insurance; that there was nothing in the roadway, movable or stationary, that the automobile did collide with, and that the evidence showed a case where the car upset 'before it struck anything outside of the road.' In O'Leary v. St. Paul F. & M. Ins. Co. (Tex. Civ. App.), 196 S. W. 575, the car of insured was stored in a garage, and was damaged by the second floor of the building falling upon it. The foregoing authorities are not apt in the instant case.

"In Harris v. Amer. Cas. Co., supra, the contention of appellee is strongly supported. The damage to the car of the insured was caused by a machine being driven off the side of a bridge and falling into the stream below; and recovery was allowed under a policy indemnifying against injury solely the result of collision with a moving or stationary object. The Justice illustrates his position by saying:

'Suppose a person driving an automobile along a road comes to a place where a highway bridge over a chasm had fallen away, and the machine be precipitated to the ground below, can it be said that there could be no recovery under such a policy as is here sued on, because the damage to the machine was caused by collision with the flat earth, instead of some upright or perpendicular object on the earth? We think not. To hold that there could be no recovery under such circumstances would be to misconstrue terms of a contract concerning which there is no room for construction, because the meaning is perfectly plain.' 83 N. J. Law 645, 85 Atl. 196, 44 L. R. A. (N. S.) 76, Ann. Cas. 1914B, 846.

"The policy involved in Hardenburgh v. Employers' Liab. Assur. Corp., 78 Misc. Rep. 105, 138 N. Y. Supp. 662, indemnified 'the assured against loss or damage to' his automobile if caused solely by collision, etc. The plaintiff's automobile, upon meeting a wagon on the highway, was steered into the grass at a point where the grass was level with the roadbed, and then down an incline below that level. While endeavoring to return to the roadbed, in a position at right angles thereto, and attempting to proceed 'up the shoulder of the road, one of the wheels collapsed and the machine was overturned.' Held, there was sufficient collision between the shoulder of the roadbed and the wheel, within the

meaning and intent of the policy, to justify a verdict for plaintiff in case the automobile did not strike the roadbed. This case was reversed on appeal, in 80 Misc. Rep. 522, 141 N. Y. Supp. 502, on the ground that the burden rested on the plaintiff to prove that the damage sustained was the result of a collision with some 'object, either moving or stationary,' and that no evidence was given of the existence of any object with which the automobile did or could have come into collision. The last holding, however, was not to the effect that a collision might not have been predicated of contact between the wheel of the automobile and the shoulder of the roadbed, if it had been shown that the collapse of the wheel had been due to such contact. Wetherill v. Williamsburgh City Fire Ins. Co., 60 Pa. Super. Ct. 37."

RECOVERY FOR BREACH OF CONTRACT FOR CHASSIS WHEN PURCHASER HAS BODY BUILT FOR SAME.—In the case of Southern Border Motor Co. v. Fasken, 286 Fed. 24, it is held by the Circuit Court of Appeals, Fifth Circuit, that where, because of the fact that the chassis for a motor truck, purchased by plaintiff from defendant, did not conform to the contract, the completed truck, including the body and seats, which under the contract were procured by plaintiff, was rendered useless, the measure of damages for breach of the contract includes the cost to plaintiff of the body and seats.

In this respect the Court in fact said:

"It is further insisted that the Court erred in its charge to the jury that, if they found for the plaintiff as to the truck, and if they found that by reason of the truck being worthless, the body and seats were of no value to the plaintiff, defendant would be liable for their value. The only ground of error assigned is that the body and seats had not been furnished by the defendant, and that it was not liable for their value, if lost by reason of the truck being worthless.

"It was stated in the contract of sale by the defendant motor company that plaintiff was to procure the body and seats for the truck and that defendant was to prepare all data and specifications for said body. The defendant negotiated for plaintiff with a body maker to furnish such body for $800. The truck was known to the motor company to be useless for the purpose for which plaintiff was purchasing it without a body and seats. The body and seats were built for and were placed on said truck. No question was made as to the reasonableness of the sums expended therefor, or as to their being properly constructed.

"If the defendant breached its contract and furnished a worthless truck which plaintiff tendered back to it, it would see that it is liable to make good to him his entire outlay, both that paid to defendant and that paid to others with his express knowledge and assent. The persons furnishing the body and seats have complied with their contracts, and they are not liable to have their goods returned, or for damages, occasioned by reason of the breach of the contract as to the truck. The truck as a whole, including the body and seats as parts thereof, has become worthless by reason of defendant's breach of its duty to plaintiff."

ADMISSIBILITY OF TESTIMONY THAT AUTOMOBILE DRIVER SAID HE WAS INSURED.—Where the plaintiff was injured while riding in defendant's automobile, testimony that, when plaintiff remonstrated with defendant and admonished him to be more careful, the latter answered, "Don't worry, I carry insurance for that," was held by the Supreme Court of New Hampshire, in Herschensohn v. Weisman, 119 Atl. 705, to be competent on the issue of negligence, having a tendency to prove that fact. A part of the Court's opinion follows:

"The Court in the charge instructed the jury in substance that the conversation between the plaintiff and defendant was admitted as acknowledging liability, and for no other purpose, and that the fact that the defendant carried liability insurance had nothing to do with the case and that they were not to consider it. The defendant excepted to that part of the charge relating to liability insurance.

"Neither of the exceptions of the defendant can be sustained, because the statement of the defendant to the plaintiff ('Don't worry, I carry insurance for that') was competent evidence. If it be assumed that generally the plaintiff in an action for negligence may not show the defendant carried liability insurance, a point not now necessary to determine in this case, the words of the defendant relating thereto, given their usual meaning demonstrate their competency as evidence. The question under consideration was the negligence of the defendant in operating his automobile. When the plaintiff remonstrated with him and admonished him to be more careful, his reply indicated that he was not concerned about his recklessness because he was protected by liability insur-

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ance. His attitude as disclosed by his words imply that he would be likely to exercise a less degree of care in operating his automobile for the reason that an insurance company would be called upon to pay for any damages occasioned to others by his reckless and negligent conduct. Consequently, the fact that the defendant carried liability insurance was competent and important evidence bearing directly upon his negligence."

REVISION OF THE CONSTITUTION AND JUDICIAL REVIEW OF LEGISLATIVE ACTS

By Gordon W. Chambers

Among the attorneys who are constantly advocating a change of policy, a new and more simple progressiveness, is one whose suggestion is a redraft of the Constitution of the United States.

They are pointing out that there has been only one convention to frame the fundamental laws of the country. It was held at the beginning of the government. Representative Fitzgerald of Ohio insists that the Constitution of the United States is archaic. He declares that it should be brought up to date. The instrument as we now have it is a patchwork. The Constitution that was framed century before last started the nation on the road to greatness but, as Mr. Fitzgerald sees it, there should be another convention now that would modernize the Constitution, iron out its hodge-podge characteristics, make its various provisions harmonious and symmetrical and add new provisions that would reflect the genius of the American people in the twentieth century.

Many States have outgrown their original charters and have held conventions to bring their Constitutions up to date. Georgia has had several, the last one in 1877, and some of the knowing ones say the time has come to hold another one. Ohio had a constitutional convention several years ago. Few of the older States are operating under their original Constitutions.

Some people see in the movement a chance to modify the prohibition amendment, of course. At the same time this Ohio Congressman and lawyer insists that he can see no harm from such a constitutional convention. He believes that "the American people are sufficiently sound to be trusted with their own affairs." He predicts great good growing from a modernized up-to-date Constitution.

For one thing, the Ohio Representative would abolish the system of two Legislative bodies and would merge the Senate and the House into one based, as the House now is, on popular representation by districts. Such scheme would mean government by the people of the densely populated districts. However, he believes the Senate of today performs no useful function, but rather is a hindrance and an impediment to the transaction of public business. It is plain that Mr. Fitzgerald has little regard for the representation of the less populated States. The Senate is where the States get their equal representation and I am sure the Southern and Western States will not agree with the Ohio Congressman that the abolishment of the Senate will do no harm.

It is also generally known that it is proposed by constitutional amendment to take from the Supreme Court the power of judicial review of legislative enactment. We have the LaFollette amendment which he is urging:

1. That no judge of an inferior Federal court shall set aside a law of Congress on the ground that it is unconstitutional and 2, if the Supreme Court of the United States shall assume to declare any law of Congress unconstitutional, or by judicial interpretation shall assert a public policy at variance with the statutory declaration of Congress, which alone under our system of government is empowered to determine public policies, the Congress may by repassing the law nullify the action of the court.

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The LaFollette amendment is generally regarded as being more radical than that of Senator Owen. As the case now is, the only checks upon the power of Congress are the presidential veto and what amounts to a veto by the courts. A veto by the President may be over-ridden by a two-thirds vote of Congress, but when the Supreme Court has said that a law is unconstitutional, Congress can do nothing except undertake to bring about an amendment to the constitution that will conform to the judicial decision.

Senator LaFollette would make it possible to over-ride a decision of the Supreme Court by a mere majority vote—not even as much of a vote as is now required to pass a bill over the President's veto.

This proposed amendment means that if the court in review holds the law to be good then it is law; if the court holds that the law is bad because it violates the Constitution, then Congress can make it law by simply re-enacting. If Congress passes a good law once, it is to remain, but in order to make a bad or unconstitutional law constitutional it will be required to do the bad thing twice, and by this repetition bad law becomes as good as good law.

If Congress strikes the Constitution only one blow with one fist, it will be called a draw; but if Congress comes back and hits the Constitution another blow with the other fist, Congress wins.

Such an amendment would mean, of course, the destruction of the form of government under which we live. Yet it is said that in Congress there are fifty members committed to it, and that various persons in official life, and at least two national conventions called to form new political parties, advocate the destruction of the court by abolishing the power of judicial review; also, more than five years ago a joint resolution was introduced into the Senate forbidding Federal judges to declare any act of Congress unconstitutional; which meant a denial of appeal in any case in which the constitutionality of any act of Congress was challenged, and further declaring that any offending judge will thereby forfeit his office.

The present renewal of attacks on the judicial arm of our government—for like attacks have been made in the past—are being attributed to the radicalism that has grown out of the destruction of $300,000,000,000 of property and 30,000,000 in lives.

The leading statesmen of the day are confident that the movement will not grow in greater strength that it has secured at this time, but they assert that these assaults upon our government can only be stopped by a statement of its fundamental objects and a repeated and reiterated defense of form, by an explanation of its machinery.

Congressman Harry B. Hawes, of Missouri, declaring that propaganda must be met by discussion and answer, points out the possibilities which would result if the movements was successful:

"To destroy, by constitutional amendment, one of the three co-ordinate and foundation branches of our government means the destruction of the present form of American government and the setting up of an entirely new and different system. It would remove the balance of power between the executive and the legislative. It would destroy the judicial check upon both. It would either increase the power of the executive and lead the way to monarchy or increase the power of the legislative and destroy the force of the executive. It would take from the American plan of government its marked difference from that of any other nation which preceded its formation. It would destroy all those interpretations of our laws which have developed with our progress and civilization and become in effect new laws. It would involve the rewriting of thousands of laws by both

State and National Governments. It would destroy the arbiter that decides disputes between citizens of States and States. It would leave our Bill of Rights, so essential to personal liberty, without special official defender. It would destroy the heart of the Constitution, because it would kill the defender of the Constitution and leave 110,000,000 people subject to the intemperate, hasty, or arbitrary act of the two remaining branches of the Government. It would remove all protection from the right of the minority. It would place unlicensed and unlimited power in the hands of a majority. It would destroy the written defense of individual liberty, because there would be no power to defend our written guaranties. It would take away the balance wheel that causes the affairs of Government to run smoothly and methodically. It would destroy our dual form of sovereignty. It would be a crowning victory for the advocates of government by mobs. It would take from the Government its fine conscience to judicially determine right from wrong by a solemn tribunal, which unswayed by partisan heat or temporary excitement, punishes or rewards without impulse created by passion or prejudice. It would destroy our sane plan of checks and balances. It would disturb, unsettle and make uncertain all the relations between men as individuals; it would make uncertain the relations between States; it would endanger the sanctity of contract; it would create for a period distrust and disputes which would destroy our national equilibrium and cause agricultural, labor, commercial and industrial chaos."

And beside these possibilities, there are certain individual rights the Constitution demands that Congress must not destroy, yet if court review is abolished, Congress will then be empowered in any one session to take away these rights:

Religious liberty; freedom of speech; freedom of the press; the right of peaceful assembly; the right of petition for the redress of grievances; the right of State militia to bear arms; no soldier shall be quartered in time of peace in a house without the consent of the owner. Unreasonable search and seizure. No arrest except upon probable cause, supported by oath or affirmation, describing the place, and the persons or things to be seized. Capital offenses must be found by a grand jury indictment. No person for the same offense shall be twice put in jeopardy, or compelled to testify against himself, nor be deprived of life, liberty or property without due process of law; no private property taken for public use without just compensation. In criminal prosecution the accused shall enjoy a speedy and public trial by an impartial jury in the district wherein the crime is committed; to be informed of the nature of the accusation; to be confronted by witnesses; to have compulsory service for obtaining witnesses and the assistance of counsel for his defense; the right of trial by jury when the sum exceeds twenty dollars. Excessive bail shall not be required nor excessive fines be imposed nor cruel and unusual punishment inflicted.

These rights are now all guarded by the Supreme Court, and its decrees have so far been enforced by mere announcement and notice given by its marshal. But back of its decree and marshal is the respect of the Nation, which means the whole power of the Army and Navy should necessity require.

The average man and woman finds in these provisions their greatest protection against abuse and tyranny; they are now written so that all may understand and are not subject to change by the whim or caprice of a passing Congress.

Certainly in their sober thought, the American people are not to make possible the surrender of these privileges. "If Congress alone is to interpret the Constitution for itself," as Senator

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Beveridge states it, "then necessarily, there would be as many different meanings given to the Constitution as there would be changing congressional majorities of different opinions."

With the Supreme Court dismantled, there would come chaos. But the alarm must be sounded and the people must be aroused to the crime that is being agitated —to the advocated assault on our form of government that is being made.

LEAVING A HORSE UNATTENDED

By Donald MacKay

One advantage of the motor, as compared with the horse, is that if left unattended it will not run away, though it may be taken away. Horse traffic is, however, still an important item in city transport, and the question which was discussed in the recent case of Hendry v. McDougall (1923 S. L. T. 154) is one of practical as well as legal interest. The point there was whether the owner of a horse which had been left unattended in the street by its driver and ran away, was liable for the resulting damage caused by the horse.

There have been not a few previous cases and the point is one of some difficulty. The question whether a driver is in fault in leaving his horse unattended is a question of circumstances, and generally we may agree with what the Lord Justice-Clerk said in McEwan v. Cuthill (25 R. 57), that "there is no general rule." Much, for example, will depend on the type of horse, the time during which the driver is absent, the distance to which he goes, and also the character of the *locus*. Thus it may be observed therefore that C. J. Tindal's famous *dictum* in Illidge (5 C. & P. 190): "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done"—must be read in light of the circumstances in that particular case. In each instance, therefore, the question is, Do the circumstances amount to fault on the part of the defender? This the plaintiff must aver and prove, if he is to succeed.

Thus in Shaw v. Croall (12 R. 1186), where a horse was left unattended for a short time in a station yard, the Court held that fault was not established, but Lord Shand said: "It is, in the first place, important to observe that the cab was not standing in the public street, where perhaps more care would be required; it was standing in what may fairly be described as enclosed ground." Again, in McEwan v. Cuthill, where the defender was liable for damage resulting from his horse being left unattended, the judgment proceeded on two specialties, to-wit, (1) that the driver had gone into the back part of a shop out of sight of his horse, and (2) that the place where the horse was left was within a few yards of passing trains.

The action further can only suceed on proof of fault on the part of the defendant or someone for whom he is responsible. It is necessary, however, to consider what is the position of a person who has left a horse unattended on a public street with the result that the horse has bolted and a person lawfully using the street has in consequence been injured. In Illidge v. Goodwin (5 C. & P. 190 at p. 192), Tindal, C. J., said: "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." This view seems to have received the approval of the Court of Appeal in Engelhart v. Farrant & Co. ([1897], 1 Q. B. 240), where L. J. Lopes said (at p. 245): "Mears left the cart and horse in the street unattended, and for this, if nothing more had taken place, the defendant would be liable, provided Mears's act caused the mischief, for it was negligence on his part." Writers on the subject of negligence in law have criticized the *dictum* of Tindal, C. J., if accepted in a general sense and without reference to the cir-

cumstances of the particular case with which he was dealing. See Bevan on Negligence in Law (3rd ed., Vol. 1, at p. 545) and Glegg on Reparation (p. 382). There have certainly been cases where it has been held that the circumstance of leaving a horse unattended for a short period of time and for a necessary purpose does not of itself involve liability if the horse bolts. A useful illustration of this may be found in the case of Shaw v. Croall & Sons (12 R. 1186). In that case the driver of a cab had drawn up his cab on a stance at a railway station which was within an enclosure railed off from the public street. He got down from his box, took a bag of oats from a place where it was kept, at a distance of ten feet from the horse's head, filled his horse's nosebag, and had turned to put back the bag of oats when the horse bolted. It was held that in such circumstances there was no liability on the part of the defenders, who were owners of the cab. The Lord President said: "I cannot say that he (i. e., the driver) was acting with anything but the ordinary caution to be expected and demanded of a man in his position." In McEwan v. Cuthill (25 R. 57) a lorryman left his horse and lorry unattended at the door of a shop in a village while he went into the back part of a shop to find out where the goods were to be deposited. He was out of sight of the horse, which bolted because it was startled by the whistle of a train which passed on a railway under the road a few yards from the shop. It was held that the employer of the lorryman was liable for injuries caused to a woman who was knocked down by the runaway horse. Similarly, in Milne & Co. v. Nimmo (25 R. 1150) the driver of a pony and van who, after yoking the pony to the van preparatory to leaving the stableyard, opened the gate of the yard, separating it from the public street, and then went a few yards behind the van to get his coat, was held in fault for injury caused by the pony bolting. On the other hand, in the case of Wright v. Dawson (5 S. L. T. 196), it was held that a case of liability was not made out because the driver of a lorry had left the horse's head to assist in unloading a second lorry.

In the case of Hendry v. McDougall, which was before the Court, the plaintiff had been seriously injured by one of the wheels of a cart when she was walking on the foot-pavement of a street going towards Denny. For this accident she was herself in no way responsible. The defendant was the tenant of a farm in the neighborhood. She had sent a horse and cart in charge of a lad in her employment to do some business of hers in Denny. He had left the horse and cart unattended on the street while he went into a shop to get a can filled with paraffin. For some unexplained reason the horse bolted, with the result that one of the wheels, which came off, bounded onto the pavement and struck the pursuer. She brought this action to recover damages against the defender.

The Court were of opinion that the driver was negligent, and they found his employer liable in damages. They considered that the driver was not attending to his horse when it bolted, and that he was therefore guilty of negligence for which the defendant was responsible in law. The driver chose to go inside the shop to wait his turn when he need not have done so, but might have waited outside in the vicinity of his horse. He put himself in a situation in which it was impossible for him to exercise and control, vocally or manually, over his horse should it become restive. The result was that, before he could reach the place where he had left his horse, it turned round and bolted and he was unable to do anything.

The following passage from the judgment of Lord Anderson gives the result in law at which the Court arrived: "It is manifest," his Lordship observed, "that no presumption of fault arises from the fact that a horse bolts. Bolting may

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take place when the horse is being most carefully driven and in circumstances which negative any suggestion of negligence. It is true that bolting may take place in circumstances, admitted by a defender or proved by a pursuer, which take place on the defender an *onus* of explanation, but, as a general rule, in cases of this nature negligence must be averred and proved before a decree for damages can be pronounced. Both the English authorities and those in our own Courts make it quite clear that the circumstances of each case, proved or admitted, determine whether or not negligence has been established. The question of fault is always correlated to the question of duty, and the duty of one who is in charge of a horse towards the persons or property of third parties is to protect them from the activities of the animal of which he is in charge. This duty is discharged by the exercise of reasonable care in attending to the horse. The question in every case accordingly is: Was the driver attending to his horse, that is, was he looking after it with reasonable care? This question, in my opinion, cannot be answered favorably to a driver unless it be shown that he has remained in such proximity to his charges as to enable him to exercise control over its movements."

Speaking generally, the case has made the *onus* heavier on the owner of the horse to show that his servant was not negligent. In fact so heavy that the law practically is now as stated by Lord Young in the case of Milne (25 R. 1153). "If a carter leaves his cart to deliver a parcel at a shop door, and his horse runs away and knocks down someone in the street, the risk is with him and his master, and not with the innocent person on the street."

INTERSTATE COMMERCE—REPAIRMAN OF TRACK SCALES

CHICAGO, M. & ST. P. RY. CO. v. CHINN

137 N. E. 885

Appellate Court of Ind. Feb. 2, 1923.

A railroad employee engaged in repairing car scales, used indiscriminately in weighing interstate and intrastate shipments, who was fatally injured while making a trip to the yardmaster's office for his railroad mail, was not engaged in interstate commerce so as to be controlled by the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), but was within the Workmen's Compensation Act.

Beasley, Douthitt, Crawford & Beasley, of Terre Haute, for appellant.

Hamill, Hickey, Evans & Danner, of Terre Haute, for appellees.

NICHOLS, C. J. This was an action before the Industrial Board to recover compensation for alleged injuries and death of Alfred P. Chinn, husband of Eva Chinn and father of Henry Chinn, which injuries were alleged to have been sustained while in the employ of appellant on December 20, 1921. It is alleged that the decedent's injuries were sustained by reason of an accident arising out of and in the course of his employment while acting as superintendent over men working in appellant's Hulman street yards in the city of Terre Haute.

The Industrial Board found that, on and prior to December 20, 1921, the decedent was in the employment of appellant at an average weekly wage of $24; that appellant was a common carrier and was engaged in such business during the entire period of the employment of the said decedent; that as such common carrier appellant, during said period, operated a line of railroad from points within the state of Indiana to points without, and was engaged in both interstate and intrastate commerce as such common carrier; that on December 20, 1921, while employed in, and performing services for, appellant as such common carrier in intrastate commerce, the said decedent received a personal injury by an accident arising out of and in the course of his employment, and arising out of the performance of services in intrastate commerce; that such injury resulted in his death on January 16, 1922; that he left surviving him, as sole and only dependents, appellees his wife and his son, under eighteen years of age; that said decedent was living with his said wife and son at the time of the injury

and death, was supporting them from his earnings, and they were wholly dependent upon him; that appellant had personal knowledge of such injury and death at the time of the occurrence.

On this finding the Industrial Board awarded appellee in equal shares compensation at the rate of $13.20 per week, to begin January 16, 1922, and continue during the period of their dependency, not exceeding 300 weeks.

Appellant answered that decedent and appellant, at the time of the alleged injuries, were each engaged in interstate commerce; that appellant operated a system of steam railroads extending through the states of Indiana, Illinois, Wisconsin, and elsewhere; that included in such system of steam railroads, were certain tracks known as the Hulman street yards, consisting of side tracks, one of which contained railroad scales used for the purpose of weighing cars and freight used and transported in interstate commerce; that said decedent, at the time of the accident and injury, was employed by appellant in the construction, repair, and upkeep of railroad tracks, bridges, and scales; that the track, on which said gang of men and the decedent were engaged at work in making repairs and in construction work, was used to transport interstate commerce.

At the trial there was undisputed evidence, that the decedent, with the men working under him, had been repairing and improving said scales, and it was stipulated and agreed that the scales in question were, prior to the making of the repairs on the 20th of December, 1921, used indiscriminately in weighing cars containing freight shipped in intrastate and interstate commerce, and subsequent to the making of such repairs, said scales were used indiscriminately in weighing freight transported in intrastate and interstate commerce, and that appellant operated the line of railroad involved, at and prior to the time of the accident, from Westport in Indiana, to Faithorn, Ill., and that it was a part of a system of steam railroads extending through the states of Indiana, Illinois, Wisconsin, Minnesota, and other states in the northwest. At the time of the accident, decedent was making a trip to the yardmaster's office for his railroad mail, and, when crossing a track, was struck by one of appellants' trains, receiving the injury which as appellees claim, resulted thereafter in his death.

It is observed that the facts in this case as to the nature of decedent's employment at the time of his injury, whether under the Workmen's Compensation Act (Laws 1915, c. 106) or the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) are substantially undisputed, and the question becomes one of law for the court. The decisions of the different states are in irreconcilable conflict. For the purposes of this opinion, we do not need to discuss them.

In this state, the Supreme Court, in Southern Ry. Co. v. Howerton, 182 Ind. 208, 105 N. E. 105, 106 N. E. 369, held that an employee of a railroad engaged in interstate commerce, who was himself engaged in the work of laying track, or assisting in doing so, was engaged in interstate commerce, and his action was controlled by the federal statute.

In Cleveland, etc., R. Co., v. Ropp (Ind. Sup.) 129 N. E. 475, the employee was engaged in taking old tires off wheels. These tires were taken to the blacksmith shop and used to make piston keys. The keys were used to keep crossheads and pistons together on various locomotives. The court says that there was nothing in the evidence to show that the employee was doing anything immediately connected with interstate commerce. The court states the true test to be: "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" and then holds that, "measured by this test, appellee was not engaged in 'interstate transportation' nor 'in work so closely related to it as to be practically a part of it.'" As it seems to us these cases are harmonized upon the theory, that, in the first case, the employee was immediately connected with interstate transportation, while in the second the employee was not so connected. In the instant case appellees contend with much force that the scales involved were not directly and immediately used in interstate transportation; and that they could only be used to obtain weights for the clerical department; and that they had nothing whatever to do with the actual movement of trains. Adopting this contention, we must hold that the principle announced in the Ropp Case in directly in point.

It seems to us that the rule, as announced in the Howerton Case, supra, that the decisions of the Supreme Court of the United States within its domain are binding upon this court, must be of controlling force. See, also, Bennett v. Atchison, etc., R. Co. (Iowa) 174 N. W. 798, where the court holds that the requirements and federal court interpretation of the federal act must prevail over any other state law or state court interpretation.

Appellant relies with much confidence upon Pederson v. Delaware, etc., R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. This case involved the right of an employee engaged in repairing a railroad bridge regularly used in both interstate and intrastate commerce. The bridge was a part of the right of way over which trains passed, and therefore the employee's work directly affected the movement of trains, and was immediately connected with interstate commerce. This case is in harmony with the Howerton Case, supra; and Pryor v. Williams, 254 U. S. 43, 41 Sup. Ct. 36, 65 L. Ed. 120, was another bridge case, and it was tried without question as to its being within the scope of the federal act. But other federal cases have established the rule that, unless the employment is immediately connected with interstate transportation, it is not within the scope of the federal act.

In Delaware, etc., R. O. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, it was held that an employee, while mining coal in a colliery owned and operated by a railroad company, the coal to be used in its conduct of interstate commerce, was not engaged in interstate commerce.

In Chicago, etc., R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, a switchman engaged in shifting coal cars from storage tracks to the company's coal sheds, to be placed in bins and supplied as needed to both intrastate trains and interstate trains, was held not to be engaged in interstate commerce.

In Shanks v. Delaware, etc., R. Co., 214 N. Y. 413, 108 N. E. 644, Ann. Cas. 1916E, 467, on error 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, it was held that an employee of a railroad company, engaged in both interstate and intrastate commerce, working as a mechanic principally in running a machine where he shaped parts to be used in the repair of locomotives in immediate need of repair, and generally but not exclusively, in the repair of locomotives used in interstate commerce, and who was engaged on Sunday in moving the counter shaft which supplied power to the shaping machine when injured, was not employed in interstate commerce, and could not recover, the Supreme Court saying:

> "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis Case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

The Minnesota Supreme Court, in Cousins v. Illinois Central T. T. Co., 126 Minn. 172, 148 N. W. 58, held that a laborer wheeling coal to one of the car repairing shops for the purpose of heating stoves in the shop, where other employees were engaged in repairing cars used in interstate commerce, was himself engaged in interstate commerce, but this court was reversed in this decision in 241 U. S. 641, 36 Sup. Ct. 446, 60 L. Ed. 1216. The same court was again reversed in Minneapolis, etc., R. Co. v. Nash, 242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531, where the court held that a laborer engaged in moving parts of an outhouse to replace an old one, was not engaged in interstate commerce.

[1, 2] Following the principle of these federal cases, we must hold that the work of improving and repairing the scales involved was not so closely connected with interstate transportation as to be controlled by the Federal Employers' Liability Act, and that the Industrial Board therefore had jurisdiction. There is evidence that the decedent's injury was the cause of his death, and this court will not weigh the evidence.

The award of the Industrial Board is affirmed.

NOTE—*Workman on Scales and Buildings as Engaged in Interstate Commerce.*—The reported case seems to be one of first impression in point of fact that the employee was working on scales owned by an interstate railroad. There are other cases, however, similar in principle.

In the case of Boles v. Hines, Mo. App., 226 S. W. 272, it was held that a carpenter repairing a depot used in interstate commerce was not engaged in interstate commerce, within the Federal Employers' Liability Act.

An employee painting a baggaae room used for both interstate and intrastate baggage, was held to be engaged in interstate commerce, although at the time there was no interstate baggage in the room. Culp v. Atlantic City R. R., 93 N. J. L. 244, 110 Atl. 115.

In Wright v. Interurban Ry. Co., Ia., 179 N. W. 877, it was held that a workman employed in the reconstruction of a building used as an electric substation by defendant employer, an interstate electric road, during which work no part of the work of operating the railroad was carried on in or through this substation, was not engaged in interstate commerce.

Where an employee was working on a turntable which was to take the place of an old one, the new one being larger than the old

and operated electrically while the old one was operated by hand, it was held that the work was that of construction, and not repair, and that at the time in question the new turntable had not yet become an instrumentality in interstate commerce, and, hence, that the employee was not engaged in interstate commerce. Seaver v. Payne, 198 App. Div. 423, 190 N. Y. Supp, 724.

The making of repairs on a coal chute, where coal is stored for the purpose of being supplied to both interstate and intrastate engines as called for, was held not such an act in aid of interstate commerce as to bring an injured employee's case within the Federal Employers' Liability Act. Capps v. Atlantic Coast Line R. Co., 178 N. C. 558, 101 S. E. 216, certiorari denied, 252 U. S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726.

In Thompson v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256, 176 S. W. 1006, 20 N. C. C. A. 10-11n, the court held that, as plaintiff was injured while working upon the extension to repair shops, and the extension and old part had been thrown into one, and tracks had been laid in the extension, pits dug, cranes and other machinery used in repairing and handling engines installed, several engines run on the tracks already laid, and a few engines set in for temporary work, he was engaged in interstate commerce.

One employed by a railroad company to inspect and repair the plumbing of depots used in interstate commerce, was, while so engaged, working in interstate commerce. "The stations actually in use in the carrying on of interstate commerce are clearly instrumentalities of such commerce, and it is necessary to their proper maintenance that the plumbing should be kept in repair." Vollmers v. New York Cent. R. Co., 180 App. Div. 60, 167 N. Y. Supp 426, 19 N. C. C. A. 35n.

CORRESPONDENCE

FOUR TO FIVE DECISIONS

July 17, 1923.

To the Editor of the Central Law Journal:

It appears to me that what has become as well known as "Four to Five Decisions" can be easily avoided if regard be given to the origin and true nature of the Supreme Court of the United States.

The Supreme Court of the United States is nothing more than an association of men created by law, and like any other association of men, created by law, under the Common Law, have the right for a government of themselves by by-laws, and those by-laws can be so framed as to put an end to the evils of "Four to Five Decisions."

That the Supreme Court is an association of men created by law, the words of Article 3 of the Constitution of the United States plainly show. Section 1 of that article says "that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

In the second clause of Section 2 of that article, it is ordained as follows: "In all the other cases above mentioned (those affecting ambassadors, etc.; those in which the State shall be a party), the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and *under such Regulations as the Congress shall make.*"

Section 1 of Article 3 does not say whether the Supreme Court shall consist of one man or more than one man, therefore, the first Congress enacted a law making the Supreme Court at first to consist of five judges by subsequent enactments, Congress has increased the number of judges to nine.

Clearly those five original judges and the nine judges who succeed them are the creations of the acts of Congress. As such, they have the Common Law power of making reasonable rules controlling the action of the Association enacted by a majority, which would be binding upon all the members of that association, including the minority.

While it would be the duty of every judge to express his opinion about any cause before them, whether on appeal or original jurisdiction, according to his convictions, there can be no question that that association of judges may make a by-law to the effect that when the Constitutionality of an Act of Congress is involved, or an Act of the Legislature of a Sovereign State is involved, no decision which the Court may make shall operate to annul that law of Congress or that law of the State Legislature, which has not the favorable vote of a greater or less number of judges to be defined by the by-law.

Such a by-law, under the Common Law, governing the Supreme Court of the United States, as well as every court in this country, would be binding upon all members of the court until repealed by a majority of the members of the court which created the by-law.

Yours truly,

FREDERICK G. BROMBERG.

A clerk in a Centerville, Ia., shoe store, whose head was almost bald, was trying on a pair of shoes for one of the female species. She was paying more attention to those around her than she was to her foot. When she happened to look down she espied the clerk's bald head and thinking it was her bare knee quickly grabbed her skirt and covered it. Timely assistance on the part of fellow clerks saved the bald one from suffocation.—Greencastle, Mo., Journal.

ITEMS OF PROFESSIONAL INTEREST

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS

QUESTION No. 222

In the opinion of the Committee are advertisements in daily newspapers, substantially in the following form, professionally improper:

"LAWYER

_____Street, Suite_____

Consultation and Advice Gratis"

"EXPERIENCED, reliable lawyer, all matters; consultation free

_____St., Tel._____"

ANSWER No. 222

In the opinion of the Committee such advertising does not properly comport with the responsibility or dignity of the office which the lawyer holds. (See Canon 27 American Bar Association; Committee's Answer 45). The failure to disclose the name of the advertiser, and the attempt to secure remunerative employmnt under the guise of offering free consultation and advice too readily lend themselves to imposition and fraud upon those clients who would be likely to be secured through this form of anonymous solicitation. The adoption of such form readily also affords an opportunity for those who are not authorized to practice law to pretend such authority in order to deceive those who would respond to such an advertisement.

QUESTION No. 223

There is a small and compact community of Spanish-speaking Jews, designated as Sephardic, who patronize newspapers using the ancient Spanish language, but printed in Hebrew characters.

In the opinion of the Committee would there be any professional impropriety in a lawyer, who is a member of this community and duly admitted to practice, inserting in such newspapers in the Spanish and English languages a card in substantially the following form:

_____ (name)

Attorney and Counsellor at Law

_____(Office address)

Office hours: _____

Telephone: _____

Sephardic Spanish Lawyer

ANSWER No. 223

The Committee is of the opinion that if the final line were omitted, there would be no professional impropriety in the insertion in the newspapers named of a card in the form as proposed, but as to the final line the Committee cannot express an opinion upon its import to the readers, and therefore expresses none upon its propriety.

JINGLE

WHERE HAS THE CLIENT GONE?

The client was once the lawyers own
  Exclusive personal property,
Until general business took on "tone"
  And character and dignity.

But then in the scramble for high sounding terms
  And talk of "service" by business and trade,
The word "client" was seized on by brokerage firms
  And hauled into ads about investments that paid.

Then beauty shops, feeling the call to new things,
  Started talk of refined and elite "clientele,"
While the corsetiere, learning what good language brings,
  Put Gossards on her "clients" as well.

Lawyer Jones' clientele included the name
  Of the fish merchant Ephraim Todd,
To whose market the lawyer on Friday's came
  For his weekly supply of flounder or cod.

But this is now changed—
"Nothing to sell but service"
  Is the high-class fish market ad of today;
In this distinguished and genteel profession
  The fish are now given away.

So on Friday there stream in "fish clients"
  To consult and advise upon fish,
In Todd's judgment they place great reliance,
  He knows what will make the best dish.

Isaac Goldberg, his eye on the profits,
  Gives financial advice and relief
In his three-ball place back of Sol Litt's
  To "clients" whose ships strike a reef.

Our daughters are "clients" of movies,
  Our sons of the billiard hall;
No wonder the lawyer's complaining,
  It leaves him no clients at all.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles**—Approaching a Stationary Vehicle.—In approaching a stationary vehicle, an automobile operator should be charged with the duty of observing whether any persons are about the standing vehicle, and should have his car under such control as to avoid accident should any such person attempt to cross the road in front of the on-coming car, provided such persons are themselves in the exercise of due care.—Daughraty v. Tebbets, Me., 120 Atl. 354.

2.——Defective Brakes Unknown to Occupant.—Gross or willful negligence, or an unlawful act of driver of an automobile, may be imputed to an occupant injured at a crossing, under Civ. Code 1912, § 3230, exempting a railroad from liability in such a case, if the person injured, or the person having charge of his person or property, was guilty of gross or willful negligence, or was acting in violation of law, and such negligence or unlawful act contributed to the injury, and this rule will be applied where driver's unlawful act was going on the highway with an automobile having defective brakes, though occupant did not know of the defective brakes.—Neely v. Carolina & N. W. Ry. Co., S. C., 117 S. E. 55.

3.——Pipe Extending From Rear of Truck.—A child aged 5½ years cannot be said to be guilty of contributory negligence, if while playing upon the sidewalk in front of her home on a narrow city street she hugs an electric lamp post with her arm, and it is crushed by a long iron pipe extending from the rear of a truck which the driver is attempting to turn from the street into an alley on the opposite side.—McCallam v. Hope Natural Gas Co., W. Va., 117 S. E. 148.

4.——Ten Miles an Hour Through Business Portion of City.—Motor Vehicle Law, § 22, making speed exceeding 10 miles an hour through closely built-up business portions of city, prima facie evidence of negligence, is not unconstitutional as an attempt by the Legislature to exercise judicial power, as depriving one, defending an automobile injury action, of his property without due process or as special legislation.—Morrison v. Flowers, Ill., 139 N. E. 10.

5. **Bankruptcy**—Bank's Claim Against Trustee.—Where a trustee in bankruptcy, under Bankruptcy Act, § 61 (Comp. St. § 9645), deposited money in a bank which became insolvent, he was entitled to set off the deposit against the bank's claim against the bankrupt estate, where the bank received the deposit with notice that it was part of a fund appropriated to pay the bankrupt's debts, including its own.—Gardner v. Chicago Title & Trust Co., U. S. S. C., 43 Sup. Ct. 424.

6.——Bulk Sales Law.—Where insolvent, without complying with Personal Property Law, § 44, relating to bulk sales, sold a stock of goods for full value, and used the proceeds to pay some of his creditors, and later obtained a discharge in bankruptcy in a proceeding in which no trustee was appointed, as no assets were discovered, held that a creditor, who had proved his claim in the bankruptcy proceedings, could have the sale declared void.—Kirkholder & Rausch Co. v. Bridgland, N. Y., 199 N. Y. S. 113.

7.——Common Law Trust Entitled to Benefits of Act.—Under Bankruptcy Act, § 4b (Comp. St. § 9588), a voluntary unincorporated association, under articles providing that members be given shares for their respective contributions to the capital fund, and that they elect trustees annually, who in turn select officers, with powers such as are incident to corporation officers, is entitled to the benefits of the Bankruptcy Act, as against the objection that it was in effect a Massachusetts trust.—In re Sargent Lumber Co., U. S. D. C., 287. Fed. 154.

8.——Priority of Lien.—More than four months before petition in bankruptcy was filed, a creditor sued the bankrupt, and attached in such action real property which the bankrupt had theretofore conveyed to his wife. In such action judgment was recovered within four months of filing petition in bankruptcy. After obtaining judgment, the creditor began an ancillary creditor's action to enforce the lien acquired by the attachment. Held that the bankruptcy court would not grant motion of other creditors, or of the bankruptcy trustee, for an order staying the prosecution of the creditor's action, as the lien acquired in the first action survived, for the purpose of allowing the creditor to rely on its existence as taking the case out of the bankruptcy court.—In re Houtman, U. S. D. C., 287 Fed. 251.

9.——Wife of Bankrupt Testifies.—Under Bankruptcy Act, § 2, cl. 6 (Comp. St. § 9586), giving the bankruptcy court power to bring in additional persons, where necessary for the complete determination of the matter in controversy, the court can bring in the wife of the bankrupt in order to determine the right of the bankrupt to a homestead in lands adversely claimed by creditors under a deed from the bankrupt and his wife.—In re Marschall, U. S. D. C., 287 Fed. 187.

10. **Banks and Banking**—Authority or Power of State Superintendent.—Under the provisions of the banking act of 1919 (Ga. L. 1919, p. 135 et seq.), the superintendent of banks is without authority or power to make it a condition precedent to the reopening of a state bank that any of its employees shall not be reinstated, unless he first finds such employees to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or that they have persistently violated the laws of the state or the lawful orders of the superintendent.—Milton v. Bank of Newborn, Ga., 116 S. E. 861.

11.——Special Deposits.—The purchase by one at a bank of drafts does not constitute the money paid for them a special deposit in favor of the purchaser.—Gellert v. Bank of California, National Ass'n, Ore., 214 Pac. 377.

12. **Bills and Notes**—Bank As Collecting Agent.—Where a check payable to one or order is indorsed in blank and deposited in a bank for collection, the bank thereby does not become a "holder for value" of the check.—Bank of Gulfport v. Smith, Miss., 95 So. 785.

13.——Collateral Security for Existing Indebtedness.—A bank to which a mercantile company was indebted, and which took from the company a negotiable note secured by mortgage as collateral

security for the existing indebtedness for a loan made at the time to the company, and for further advances by the bank to the company, was a bona fide holder for value, in the absence of any evidence that it had any notice of any rights or equities of the original payee of the note at the time of the transfer.—Bentley Mercantile Co. v. Blackwood, Ala., 95 So. 808.

14. **Carriers of Goods**—Household Goods.—Since a watch and cuff buttons, valued at $20, are not household goods, their presence in a shipment to a carrier without revealing their special value is a fraud upon the carrier which discharges its liability for loss of those articles irrespective of Rev. St. arts. 707, 708.—Lancaster v. Houghton, Tex., 249 S. W. 1103.

15.——Penalty for Failure to Pay Claims.—Crawford & Moses' Dig. § 937, imposing upon an express company a penalty of $2 per day for failure to pay a claim for delay in delivering express shipments, is unconstitutional because the penalty fixed is exorbitant and unreasonable.—Southern Express Co. v. Couch, Ark., 249 S. W. 559.

16. **Carriers of Passengers**—Unrevocable Permit to Operate Bus.—Where the State Road Commission has granted a permit to operate a motor bus line, under class I, § 82, c. 112, Acts 1921, it cannot be withdrawn, nor can it be revoked except for cause set forth in the act.—State v. Fortney, W. Va., 116 S. E. 753.

17. **Commerce**—Present Intention Sell and Ship.—The manufacture and production of articles is not interstate trade or commerce, even though there may be a present intention to sell and ship them in such trade or commerce.—United States v. National Ass'n of Window Glass Mfrs., U. S. D. C., 287 Fed. 228.

18.——Sales Office Located in State.—A foreign corporation, having a sales office and salesmen in Massachusetts, but shipping goods from points outside the state on orders transmitted to principal office in Pennsylvania and there passed on, and keeping no samples or other merchandise in Massachusetts, held engaged exclusively in "interstate commerce."—Alpha Portland Cement Co. v. Commonwealth, Mass., 139 N. E. 159.

19. **Constitutional Law**—Legislative Power.—Const. art. 6, § 1, providing that the judicial power of the state shall be vested in one Supreme Court and in such circuit, chancery, and other inferior courts as the Legislature shall from time to time ordain and establish, vests all power, and the Legislature can neither add to nor take away from such grant of power.—In re Cumberland Power Co., Tenn., 249 S. W. 818.

20.——Public Policy.—A statute cannot be invalidated by a court, on the ground it is against public policy, since the Legislature is the arbiter of public policy, and its enactments can only be set aside when contravening some constitutional provision, or when it is so insensible as to be incapable of a reasonable interpretation or impossible of execution.—State v. Giletto, Conn., 120 Atl. 567.

21.——Reasonable Classification.—Such classification being reasonable, there is no denial of the equal protection of the law, and no deprivation of property without due process of law, and no violation of the provision of the state Constitution, which declares that protection of person and property is the paramount duty of government, and shall be impartial and complete.—Wright v. Hirsch, Ga., 116 S. E. 795.

22.——Soldier's Preference.—Chapter 192, Laws 1919, the Soldier's Preference Act, does not violate the equality provisions of the Constitution, nor the provision that the subject of the act shall be expressed in its title.—State v. Matson, Minn., 193 N. W. 30.

23.——Vagrant.—Rev. St. 1919, §3581, providing that every person found tramping or wandering around from place to place without any visible means of support shall be deemed a "vagrant," is not in violation of Const. art. 2, § 4, providing that all persons have a natural right to life, liberty, and the enjoyment of gains of their own industry, as penalizing poverty, as the acts denounced are "tramping" or "wandering," and the going from place to place seeking employment is not within its inhibition! "tramping" meaning moving about from place to place as a tramp or beggar without actual destination or honest purpose, and "wandering" meaning rambling here and there without any certain course and no definite object in view.—Ex parte Karnstrom, Mo., 249 S. W. 595.

24. **Contracts**—To Sell Only to Defendant.—Where plaintiff agreed to sell and defendant to buy all the lumber that plaintiff manufactured in a certain year not exceeding a specified quantity, the obligation of plaintiff to sell only to defendant was a sufficient consideration to sustain plaintiff's option.—Green v. Lovejoy, Minn., 193 N. W. 173.

25. **Corporations**—Common Seal.—That the common seal of a corporation is affixed to an instrument executed by it is prima facie evidence that it was so affixed by proper authority.—Henrico Lumber Co. v. Dare Lumber Co., N. C., 117 S. E. 10.

26.——Liable for Slander by Agent.—A corporation is liable for slander uttered by its agent, acting within the scope of his employment and in the peformance of his duties touching the matter in question, and in such case it is unecessary for a plaintiff to show that the slanderous words were spoken with defendant's knowledge or with its approval, or that it ratified the act of the agent.—Doherty v. L. B. Price Mercantile Co., Miss., 95 So. 790.

27. **Damages**—Election to Sue on Contract.—If a contractor upon default by owner, preventing completion of contract, elects to sue upon the contract, the measure of his recoverable damages will include what he has actually expended toward performance and the profits he would have realized by performing the whole contract.—Kansas City Structural Steel Co. v. Athletic Bldg. Ass'n, Mo., 249 S. W. 922.

28. **Frauds, Statute of**—Parol Agreement for Long Term of Years.—When the parol agreement to make a gift of land has been acted on by the promisee, who goes into or remains in possession on the faith of the promise to convey, and expends time and money in paying taxes, insurance, repairing, maintaining and improving the property, especially for a long term of years, the statute does not apply.—Thierry v. Thierry, Mo., 249 S. W. 946.

29. **Highways**—Negligent Driving of Minor Imputed to the Person Signing Application.—Under Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, declaring it unlawful for one to permit his child, ward, or employee to drive his auto on the highway without first obtaining a license for him, that application of a minor shall not be granted unless his parent or guardian sign it, and that negligent driving of a minor so licensed shall be imputed to the person signing his application the minor's negligence is so imputed, though the one signing as "parent" merely stood in the relation of in loco parentis to the minor, and employed him to drive his machine.—Buelke v. Levenstadt, Calif., 214 Pac. 42.

30. **Insurance**—Agent of Foreign Corporation.—Affidavits that a Swedish insurance corporation in the policy named a Delaware corporation with an office in New York as its agent, that the Delaware corporation adjusted claims of loss and had paid at least one claim for the Swedish corporation, that the Delaware corporation informed insured that the loss was not covered by the policy, and that the Swedish corporation instructed Delaware corporation to continue that position, held to show that the Swedish corporation was doing business within the state of New York, within General Corporation Law, § 47, and that the Delaware Corporation was its managing agent within Civil Practice Act, § 229, on which service could be made.—Henriques v. Gauthiod Marine Ins. Co., N. Y., 199 N. Y. S. 131.

31.——Assured Entitled to Sue Insurer.—Policy whereby insurer agreed "to indemnify the assured from liability imposed on him by law for loss and for expenses arising or resulting from claims upon the assured for damages on account of bodily injuries or death resulting at any time therefrom,

suffered by any person or persons as the result of an accident occurring while this policy is in force by reason of the ownership, maintenance or use" of the described automobile, and further providing that no action by the assured should lie against the insurer until the amount of damages should be determined by final judgment against the assured or by any agreement between the assured and the plaintiff without written consent of the company, held to constitute an agreement to indemnify assured from liability, entitling the assured to sue the insurer as soon as a judgment had geen recovered against him on a claim covered by the policy, and not a contract to indemnify the assured from loss.—Capelle v. United States Fidelity & Guaranty Co., N. H., 120 Atl. 556.

32.——Building Falling.—In an action on a policy covering a stock of goods, where insurer set up a defense under a provision of the policy providing that, if a material part of the building containing the goods shall fall except as the result of the fire, the policy shall immediately cease, insurer had the burden of proving this defense.—Keistler Co. v. Aetna Ins. Co., S. C., 117 S. E. 70.

33.——Premium Retained.—If an automobile was stolen on August 17th, and loss reported the next day, and, after the adjuster's investigation and report to the company, liability was denied, but the premium was retained until January 25th following, long after suit was brought on the policy, such retention would be a waiver of all defenses.—Carroll v. Union Marine Ins. Co., Mo., 249 S. W. 691.

34.——Proving Claim.—Where an insurance company, after learning of the death of one insured against accidental death, presumably due to the bite of an insect, has forwarded blanks on which to make proof of death, and thereafter recalls them and gives notice that it denies liability for the death benefit, but would recognize a claim for weekly compensation if proof was properly made, held that such denial of liability to pay the death benefit excused the deceased's widow from making proof of death.—Betteys v. Aetna Life Ins. Co., Mich., 193 N. W. 197.

35. **Licenses**—Accountants' Fee.—Act No. 125 of 1908, § 4, authorizing state board of accountants to charge fee not exceeding $25, but limiting the fee to $10 for 90 days, does not discriminate between residents and non-residents, though section 5 provides fee of $25 for non-residents granted certificate without examination.—State v. De Verges, La., 95 So. 805.

36.——Blue Sky Law.—A syndicate having articles of association resembling the articles of agreement of a corporation and giving the organization full power to engage in the general oil business, providing for a capital divided into shares having a par value and placing the management in certain persons, and purported stock certificates issued stating that the holder's interest was not in the property as such, but in stock or shares held within the Blue Sky Law (Rev. St. 1919, §§ 11919-11932), making it illegal to transact business or sell shares before obtaining a permit from the bank commissioner.—Landwehr v. Lingenfelder, Mo., 249 S. W. 723.

37.——Jurisdiction of County Court.—Sp. Acts 1921, No. 359, requiring all persons to pay a tax for the privilege of keeping within Johnson County and using on any of its roads motor vehicles, after laying the tax, provided that it should be apportioned and used exclusively for roads in improvement districts, and that money collected should be apportioned by the chairman of the board of commissioners of the various road improvement districts quarterly, and that all taxes collected should be paid over to the county treasurer as the commissioners designate, is invalid within Const. art. 7, § 28, as robbing the county court of its jurisdiction over funds collected.—State v. Berry, Ark., 249 S. W. 572.

38.——Undertakers.—Paragraph 105 under section 2 of the General Tax Act of 1921 (Acts 1921, pp. 38, 69) provides for the levy of occupation taxes as follows: "Upon each person, firm or corporation whose business is that of burying the dead and charging for same, commonly known as undertakers, in cities of more than 50,000 inhabitants, per annum, $200.00; in cities of from 10,000 to 50,000 inhabitants, per annum, $100.00; in cities of from 5000 to 10,000 inhabitants, per annum, $50.00; in cities or towns of from 2500 to 5000, $20.00; in cities or towns of less than 2500 inhabitants, $10.00." The above act does not violate article 7, § 2, par. 1, of the Constitution (Civil Code 1910, § 6553), which provides: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws"—nor does it violate article 1, § 1, par. 2, of the Constitution (Civil Code, § 6358), which provides: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."—Richardson v. Barclay & Brandon, Ga., 116 S. E. 807.

39. **Municipal Corporations**—Driving Automobile Behind Street Car.—One driving automobile slowly behind a street car is not required to anticipate that some one would alight from the moving street car at an unusual place, and is not liable for injuries except under the doctrine of last clear chance.—Uetz v. Skinner, Mo., 249 S. W. 651.

40. **Sales**—Failure to Give Notice Within Reasonable Time.—Where buyer, on delivery of 400 bags of beans, examined them, put them in the warehouse, made no complaint for two months thereafter, and waited three months longer before tendering them back or having them analyzed, held there was an acceptance of the beans, and a claim for breach of warranty was barred by failure to give notice within a reasonable time.—Niehoff-Schultze Grocer Co. v. Gross, N. Y., 199 N. Y. S. 196.

41.——Reasonable Delay in Returning.—Where the purchaser of a farm tractor was fraudulently induced by the seller to buy it and to pay for it without an opportunity to inspect it, mere reasonable delay in returning it, if caused by honest efforts to make it work by trying it before and after replacing defective parts, will not necessarily defeat rescission.—Murray v. Bailey, Neb., 193 N. W. 259.

42. **Searches and Seizures**—Indications That Driver Was Intoxicated Search of Automobile Illegal.—Where a prohibition agent observed what he thought were indications that the driver of an automobile was intoxicated, and without a search warrant stopped and searched the automobile with a drawn pistol in his hand, and found liquor in the automobile, such search was illegal, under Const. Amend. 5, as to compelling one to give evidence against himself; the mere supposition that the driver of the automobile was intoxicated not bringing the facts within the principle of cases dealing with palpable violations of law, such as where an officer sees liquor being loaded on an automobile, or plainly sees liquor leaking from a vehicle in which it is being transported. Incidentally this conclusion may be aided by the provisions of the Fourth Amendment.—United States v. Myers, U. S. D. C., 287 Fed. 260.

43.——Limited to Houses.—Const. Amend. 4, protecting the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, does not prohibit a search of all premises, but is limited to houses, so that it is not violated by a search of a stable belonging to defendant.—United States v. McBride, U. S. D. C., 287 Fed. 214.

44. **Taxation**—Affecting Title.—One who, both as lessee, because of provision in his lease, and as owner, through subsequent deed from the lessors, is under legal obligation to pay taxes on land, by omitting to pay them and subsequently acquiring a tax deed under tax sale therefor, neither adds to nor strengthens his title; the transaction amounting to nothing more than a payment of taxes.—Word v. Moore, Mont., 214 Pac. 79.

45.——Collateral Inheritance Tax.—"Collateral inheritance taxes" are excise taxes, being imposed upon the transfer of property only, and not on the property itself.—In re Choate's Estate, Iowa, 192 N. W. 857.

46.——Residence Property Purchased by College.—Under Const. art 9, § 3, and Hurd's Rev. St. 1921, c. 120, § 2, cl. 2, exempting from taxation property used exclusively for "school purposes," residence property purchased by a college as a site for a fraternity house or dormitory, which has never been used for school purposes, but is rented to a tenant, is subject to taxation.—Knox College v. Board of Review, Ill., 139 N. E. 56.

47. Wills—Rent by Beneficiary.—Where all debts were paid or provided for, and the estate was ready for distribution, testatrix's daughter, who was allowed to occupy the home place free of rent for 18 months after the executor's qualification, under a provision of the will that it should be her home until a smaller place could be provided, was properly charged with rent thereafter, though the new home had not been provided, and the two years after expiration of which the executors must account and settle (C. S. § 150), had not expired; testatrix's intent being that such daughter so occupy the home for a reasonable time after testatrix's death, considering the condition of the estate and the time required for its proper settlement.—Snow v. Boylston, N. C., 117 S. E. 14.

48. Witnesses—Exclusion of Time Book.—In an action by a carpenter against his employer to recover for work, the exclusion of a time book and refusal to permit plaintiff to refresh his memory with the time book in which he had made entries showing the amount of work from time slips which had been destroyed, in view of the fact that plaintiff was the only witness and did not remember the amount of work, was error, and such error could only be regarded as prejudicial, as it deprived plaintiff of his cause of action.—Mueller v. Rock, Mo., 249 S. W. 435.

49. Workmen's Compensation Act—Burden of Proof With the Party Asserting.—The burden of showing that the wife was voluntarily living apart from her husband rests with the party asserting it as a defense to the wife's right to compensation under the Workmen's Compensation Act.—Kolundjija v. Hanna Ore Mining Co., Minn., 193 N. W. 163.

50.——Drinking Water Furnished by Hotel Cause of Accident.—The contraction of typhoid fever by a hotel waitress from drinking water furnished by the hotel held an "accident" within the Workmen's Compensation Act, and not an occupational disease, the word "accident" meaning an unforeseen event occurring without the will or design of the person whose mere act causes it.—Frankamp v. Fordney Hotel, Mich., 193 N. W. 204.

51.——Heart Disease by Overexertion.—If death from heart disease in the course of employment was caused by overexertion due to the employment, it "arose out of the employment," so as to be an "accident," within the Workmen's Compensation Act.—Ellerman v. Industrial Commission, Colo., 213 Pac. 120.

52.——Independent Act Not Compensable.—Where an employee is engaged in driving a team in constructing street paving, and drives the team onto the parking under the direction of the foreman, and then leaves his team and goes diagonally across the street to a bread wagon to get something for his lunch, and, while returning from the bread wagon to the place where he had left his team, is struck by an automobile driven by a person not employed by the construction company, the accident does not arise out of the employment, and is not compensable under the Workmen's Compensation Act (Comp. St. 1921, §§ 7282-7340).—Southern Surety Co. v. Galloway, Okla., 213 Pac. 850.

53.—Injured Waiting for Time to Go to Work.—Where one employed as a fireman in a building went to employer's loading platform, some distance from the entrance, to wait until it was time to report for work, and while sitting on the platform was struck by a box, the injury was not caused by an accident "arising out of and in the course of his employment," within the Workmen's Compensation Law, and the statutory action for his death was properly brought; the claim for compensation having been withdrawn with the consent of the commission.—Hannigan v. Technola Piano Co., N. Y., 198 N. Y. S. 823.

54.——Intention of Compensation Act.—Where a 15-year-old girl, while on her way from her place of work to the dressing room preparatory to going to lunch, went 21 feet out of her way to ascertain whether any air was coming into the room from an exhaust fan, whereby her hand was drawn into the fan and injured, no part of her work requiring her to be near the fan, whether she was doing what she did through indiscretion of youth was immaterial, the Workmen's Compensation Act being intended to compensate for negligence not willful, regardless of age, sex, ignorance or intelligence.—Saucier's Case, Me., 119 Atl. 860.

55.——Necessary Findings Before Recovery.—Act May 20, 1921 (P. L. 967), amending Workmen's Compensation Act 1915, § 306, cl. (c), by providing compensation for permanent disfigurement of the head or face, requires affirmative findings before claimant may recover thereunder: First, that disfigurement is serious and permanent; second, that it produces an unsightly appearance; and, third, an injury not usually incident to the employment.—Simon v. Maryland Battery Service Co., Pa., 120 Atl. 469.

56.——Painting Bridge.—Where deceased, a painter who did other jobs, but always did the work himself, agreed with a village to clean and paint a bridge for a specified price, under a contract permitting him to do the work in his own way at his own convenience, he furnishing his own brushes and the village furnishing the paint, but reserving no control over the details of the work, held that he was an independent contractor and not an employe within the Workmen's Compensation Act.—Village of Weyauwega v. Kramer, Wis., 192 N. W. 452.

57.——Spur Track As Plant.—Where a railroad company delivered empty cars and transported loaded cars over a spur track constructed to a point near a coal mine, and the portion of the track where the mine operator placed loaded cars was indispensable to the conduct of its business, in which its employee was injured while attempting to set a defective brake on a loaded car which he was moving in the course of his employment, the injury occurred at the "plant" of his employer within Compensation Act, § 6jj (Rev. Codes 1921, § 2889), entitling him to compensation under the act (Rev. Codes 1921, § 2911); both employer and employee having elected to operate under the act.—Black v. Northern Pac. Ry. Co., Mont., 214 Pac. 82.

58.——Traveling in His Own Automobile.—Where traveling between three cities was a substantial part of a contract of employment, employer allowed employe $30 a month for rail transportation, and employe with employer's knowledge and without objection frequently used his own automobile to make these business trips, held that an injury to employe while so using his automobile occurred in the course and arose out of his employment.—Bendett v. Mohican Co., Conn., 120 Atl. 148.

59.——Who Should Work and the Manner of Working.—Where a member of a co-partnership was engaged in repairing boilers for a logging company and was killed while riding on one of the logging trains, and it appeared that decedent was employed and paid by the hour, the contract being between the co-partnership and the logging company, that the logging company furnished the materials for the work and some of the tools, that the timekeeper of the logging company kept decedent's time, that he worked the same hours as the other employees and was subject to the orders of the superintendent as to when and upon what boilers he should work, but that the pay checks were made out to the co-partnership which designated who should do the work, the manner of doing which was entirely intrusted to the person sent, held that decedent was one of a firm of independent contractors and not an "employee" of the logging company within the Workmen's Compensation Act (Rem. Code 1915, §§ 6604—3, 6604—5).—Machenheimer v. Department of Labor, etc., Wash., 214 Pac. 17.